No. 15683

United States Court of Appeals

For the Ninth Circuit

W. S. PEKOVICH and ADMIRALTY ALASKA GOLD MINING COMPANY, a Corporation, *Appellants,*

vs.

MINNIE COUGHLIN, as Executrix of the Estate of ROBERT E. COUGHLIN, deceased, *Appellee.*

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE

APPELLANTS' REPLY BRIEF

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Appeal from the District Court for the Territory of Alaska, Division Number One

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APPELLANTS' REPLY BRIEF

The undisputed and controlling facts in this case are that Coughlin undertook the work for the going salary of $75.00 per month, as indicated by the minutes of the stockholders' meeting (R. 88) and admitted at page 8 of appellee's brief. Since money was not available to pay this salary, Pekovich agreed to give Coughlin the equivalent in stock. When money became available, Coughlin took cash in payment for his services. Now Coughlin's widow claims that he was entitled to both. This claim is based on a letter which itself shows that the stock was to be in compensation for the services, and not a bonus. It said:

> "... if you take care of the bookkeeping and other necessary things ... I will give you in compensation therefor ... 4000 shares of stock ..."

This letter clearly shows that the stock was to be full

compensation and that Coughlin waived any claim thereto when he took cash in payment for his services. If the stock had been intended to be in addition to the salary, Pekovich would undoubtedly have so stated in his letter. Appellee thinks the inference should be to the contrary because the letter does not state that it is to be "in full compensation" or "in lieu of salary," but it does say that it is to be "in compensation for" the services, which means in full satisfaction and in lieu of any other salary.

On page 8 of the brief it is stated that the letter referred to was given on the same day that Coughlin accepted the employment at a salary of $75.00 per month, and it is claimed that the reasonable inference to be gathered from this is that the stock was to "constitute an added inducement" and that it would be highly illogical that both would occur on the same day "on any basis other than that they were to form two complementary means of compensation."

But the facts are that the stockholders' meeting at which Coughlin agreed to undertake the work was held on February 1, 1954, as shown by the minutes (R. 86-88), and the letter promising the stock in compensation for the services is dated five days later, February 5, 1954 (R. 27). In view of these facts, the reasonable inference to be gathered therefrom is that the stock did not "constitute an added inducement" and that the salary and the stock did not "form two complementary means of compensation."

At pages 4 and 12 of the brief, reference is made to the letter from Pekovich to Roden, president of the

company, which is set forth at page 70 of the record, and it is stated that Pekovich did not claim that the stock was no longer due Coughlin because of drawing the salary or that the salary was to constitute a substitute for the promise of the stock. We discussed this letter at page 16 of our original brief where we pointed out that it states that it is "very plain the stock has been promised in consideration of the work to be performed," whereas "from the books it shows that Bob (Coughlin) was receiving cash monthly compensation." This certainly shows that Pekovich claimed that Coughlin was not entitled to the stock because he had received cash instead.

Appellee's brief states that Coughlin's predecessor did not regard $75.00 a month as being adequate for the services. It fails to state that the main reason Ehrendreich gave for not continuing the work was that he had "a busy tax period coming up" (R. 88). At any rate, the same reference shows that Coughlin undertook the work for $75.00 per month, and he continued it after the first year at the same salary, without any bonus.

Counsel for appellee calls attention to the rule that the judgment of the lower court will not be disturbed on appeal if there is any substantial evidence to sustain it, quoting from *Corpus Juris* and *American Jurisprudence*. But the same authorities also state the converse to the effect that the record will be reviewed when the action of the lower court appears to be clearly erroneous and is manifestly against the weight of the evidence. And it has been held that the reviewing court is not

bound by facts determined in the lower court on uncontradicted or documentary evidence (5 CJS 557-8). In 3 Am. Jur. Sec. 899, pages 463-4, the rule is explained as follows:

> "The rule giving great weight in the appellate court to the finding of the trial court on a question of fact lays no restraint on the power of the former to ascertain, by full and complete investigation and analysis of the evidence, what the facts and circumstances are and whether the general finding is consistent therewith, or in other words, whether there is any evidence to sustain the finding. . . . Findings not supported by any competent evidence or which disregard uncontroverted credible evidence, or which are contrary to a conclusion of law resulting from other facts found, cannot be sustained, and a judgment based thereon will be reversed."

That is the situation which exists here. There is no substantial evidence that the 4000 shares of stock were to be in addition to the salary of $75.00 a month which Coughlin received. On the contrary, the following facts prove without a doubt that Coughlin was not to receive the stock in addition to a salary of $75.00 a month:

1. His predecessor received $75.00 a month;
2. He agreed to do the work for the same salary;
3. Because of lack of funds, he was promised 4000 shares of stock in compensation for his services, which at the prevailing price was the equivalent of $75.00 a month for one year;
4. When money became available, he took $75.00 a month instead;
5. After the year was up he continued at $75.00 a month with no additional compensation;

6. His successor took up the work for the same salary;
7. Coughlin never told Pekovich that he claimed the stock in addition to the salary, and never asked for it (R. 38, 55, 62);
8. The stock was not listed as an asset of his estate.

In view of the fact that the letter promising the shares of stock said they were to be in compensation for the services, we think that the burden of proving that they were to be in addition to the salary of $75.00 per month is upon appellee, and she has utterly failed to sustain this burden or to offer any evidence upon which such a conclusion can be reached.

The suggestion in appellee's brief that she should be awarded damages for delay is not entitled to consideration and we shall not take the time of the court to discuss it.

We respectfully submit that the opinion of the lower court as expressed during the hearing exactly covers the situation and therefore repeat it here as follows:

> "Well, so far, here is what we have. Now let's look at it coldly. We have a company that had ordinarily paid the Secretary-Treasurer for this work and other work the sum of seventy-five dollars per month, according to the testimony. The company was broke when they made this deal with Mr. Coughlin, who had formerly been a vice-president and was very familiar with the situation of the company, so Mr. Pekovich, the defendant herein, wrote this letter. Thereafter, Coughlin, the deceased, drew seventy-five dollars per month. Now, certainly, he can't get both the stock and the money." (R. 45-6)

Not only was no evidence presented thereafter to justify a change in this opinion, but it was fully supported by competent evidence as above outlined, and we therefore respectfully request that the final decision of the lower court be reversed and that defendants be awarded their costs and disbursements herein, including a reasonable attorney's fee.

Respectfully submitted,

FRED J. WETTRICK
JOSEPH A. MCLEAN
Attorneys for Appellants.

February 13, 1958.